

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARIN DRAKE

Claimant

VS.

WILSON COUNTY

Respondent

AND

EMPLOYERS MUTUAL CASUALTY COMPANIES

Insurance Carrier

Docket No. 192,317

ORDER

Respondent appeals from an April 26, 1995 Preliminary Hearing Order by which Administrative Law Judge John D. Clark granted claimant's request for preliminary benefits of temporary total disability compensation and medical, specifically authorizing David L. Black, M.D. as the treating physician.

ISSUES

On appeal, respondent contends the Administrative Law Judge exceeded his jurisdiction and authority by failing to comply with the provisions of K.S.A. 44-510(c)(1). Specifically, respondent alleges that the Administrative Law Judge, in granting medical benefits, was required to provide respondent with the opportunity to select the authorized health care provider or permit respondent to provide claimant with a list of three (3) health care providers from which to choose.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that it does not have jurisdiction over this preliminary hearing matter. The Administrative Law Judge has the authority to make a determination at a preliminary hearing, pursuant to K.S.A. 44-534a, concerning the furnishing of medical treatment.

Respondent attempts to characterize the claimant's preliminary hearing request as one for a change of treating physician. In so doing, counsel for respondent states in his Application for Review by the Appeals Board that, "[i]t is uncontroverted that the claimant was provided authorized medical treatment." Respondent's counsel repeats this theme in his Appeal Brief. However, as claimant's counsel points out in his Appeal Brief, "was" is the operative word. The fact that respondent had cut claimant off from further temporary total disability compensation and medical treatment was the reason for the preliminary hearing.

Counsel for the respondent admitted at the preliminary hearing that medical treatment had been discontinued due to respondent's belief that claimant had not followed

through with the treatment recommended by the doctors that were authorized. In addition, subsequent to respondent's terminating medical benefits, one of the authorized treating physicians issued a report releasing claimant, finding he had reached maximum medical improvement. In any event, respondent objected to claimant's request for additional treatment at the preliminary hearing. It cannot be argued that respondent was providing medical treatment to the claimant either at the time the seven (7) day notice of intent letter was sent to respondent on January 16, 1995, nor at the time of the April 26, 1995 preliminary hearing.

The Appeal Brief of claimant pointed out the respondent's position at preliminary hearing opposing the furnishing of any additional medical treatment. Thereafter, in his Reply Brief, respondent's counsel takes a different tack and argues that K.S.A. 44-510(c)(1) should nevertheless apply under circumstances where respondent provides medical treatment but subsequently discontinues providing same following a failure to cooperate with the medical treatment by the claimant. In this way, respondent attempts to distinguish this case factually from the numerous decisions of the Appeals Board finding that an Administrative Law Judge has the authority at a preliminary hearing to designate a specific treating physician pursuant to K.S.A. 44-510(b) where the respondent has knowledge of injury and refuses or neglects to reasonably provide the services of a health care provider. Under such circumstances, the Administrative Law Judge need not give the employer the opportunity to submit the names of three (3) health care providers such as is the case in a change of physician situation pursuant to K.S.A. 44-510(c)(1).

The facts surrounding claimant's alleged failure to cooperate with medical treatment are not for the Appeals Board to decide at this juncture of the proceedings. Furthermore, the Appeals Board need not decide the question of whether the respondent unreasonably refused or neglected to provide the services of a health care provider under K.S.A. 44-510(b). It is sufficient to know, and the Appeals Board so finds, that the respondent was not providing medical treatment to the claimant at the time of the preliminary hearing. Thus, the Administrative Law Judge is empowered to designate a treating physician and his decision in this regard is nonjurisdictional on appeal from a preliminary order. Respondent's attempts to distinguish this case from prior Appeals Board decisions by drawing a distinction between cases where respondent has never provided authorized medical treatment from those where services have been provided but cut off is a distinction without a difference. Either way, the claimant is not receiving medical treatment.

Based upon the above, the Appeals Board finds that the Administrative Law Judge has not exceeded his jurisdiction and authority in designating David L. Black, M.D. as the authorized treating physician. Therefore, the Appeals Board does not have jurisdiction to review this matter under the provision of K.S.A. 44-551.

Respondent also appeals objecting to the Administrative Law Judge's Order in that it is dated April 26, 1995 and, according to respondent, the preliminary hearing was not held until April 28, 1995. Respondent provides no further argument or authority on this issue. We note that the transcript of the preliminary hearing reflects a date of April 26, 1995. Also, the Notice of Preliminary Hearing sent by claimant's counsel and stamped received by the Division of Kansas Workers Compensation on April 10, 1995 reflects, "... that a Preliminary Hearing shall be heard before The Honorable John Clark on Wednesday, April 26, 1995 at 10:00" However, the Preliminary Hearing Order of Judge Clark states that the date of the Order is April 26, 1995; whereas, the date of hearing is shown to be April 28, 1995. The Appeals Board finds that the issue of whether the hearing was on April 26, as reflected by the Notice of Preliminary Hearing and the Preliminary Hearing transcript, or was actually on April 28, as is reflected on the Order is de minimis and does not affect the validity of the Order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark dated April 26, 1995 remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER _____

BOARD MEMBER _____

BOARD MEMBER _____

c: C. Frank Allison, Jr., Overland Park, KS
Ronald J. Laskowski, Topeka, KS
John D. Clark, Administrative Law Judge
David Shufelt, Acting Director